

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

TEXAS, WISCONSIN, ALABAMA,
ARKANSAS, ARIZONA, FLORIDA,
GEORGIA, INDIANA, KANSAS,
LOUISIANA, PAUL LePAGE, Governor of
Maine, Governor Phil Bryant of the State of
MISSISSIPPI, MISSOURI, NEBRASKA,
NORTH DAKOTA, SOUTH CAROLINA,
SOUTH DAKOTA, TENNESSEE, UTAH,
WEST VIRGINIA, NEILL HURLEY, and
JOHN NANTZ,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED
STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES, ALEX AZAR, in his
Official Capacity as SECRETARY OF
HEALTH AND HUMAN SERVICES,
UNITED STATES INTERNAL REVENUE
SERVICE, and DAVID J. KAUTTER, in his
Official Capacity as Acting COMMISSIONER
OF INTERNAL REVENUE,

Defendants.

Civil Action No. 4:18-cv-
00167-O

CALIFORNIA, CONNECTICUT, DISTRICT
OF COLUMBIA, DELAWARE, HAWAII,
ILLINOIS, KENTUCKY,
MASSACHUSETTS, MINNESOTA by and
through its Department of Commerce, NEW
JERSEY, NEW YORK, NORTH CAROLINA,
OREGON, RHODE ISLAND, VERMONT,
VIRGINIA, and WASHINGTON,

Intervenor-Defendants.

INTERVENOR STATES' RESPONSE TO JULY 16, 2018

COURT ORDER

The Intervenor States submit this response to the Court's July 16, 2018 Order directing the parties "to file any additional information they wish to present in opposition to considering" the issues raised by the briefing on Plaintiffs' Application for a Preliminary Injunction "on summary judgment." ECF No. 176. The Intervenor States understand that Order not as a request to present additional evidence or arguments they might submit in support of (or in opposition to) a motion for summary judgment, but instead a request to identify for the Court what evidence and argument they might wish to raise during summary judgment briefing.

The Intervenor States respectfully submit that this Court should not convert the briefing on the preliminary injunction application into a motion for summary judgment. The Intervenor States' opposition to the application for a preliminary injunction focused on the legal and evidentiary standards that govern that relief. At the summary judgment stage, however, the Intervenor States would be afforded an opportunity to more fully brief legal issues that the preliminary injunction legal standard and page limitations did not permit previously. These issues include, but are not limited to: (1) whether Plaintiffs have Article III standing to challenge the constitutionality of the minimum coverage provision; (2) whether the minimum coverage requirement under 26 U.S.C. § 5000A may now be sustained under the Commerce Clause, *see* State Defendants' Br. in Opp. to Plaintiffs' Application for a Preliminary Injunction, ECF No. 91, at 18 n.17; (3) whether an injunction limited to the 20 Plaintiff States is legally supportable and whether it would harm the Intervenor States,¹ (4) whether regulations promulgated under the Affordable Care Act remain

¹ The Plaintiff States requested this narrower injunctive relief for the first time in their Preliminary Injunction Reply Brief. *See* ECF No. 175 at 29-30.

lawful if the minimum coverage provision, or any other provisions, are struck down; (5) whether the Supreme Court’s “modern severability precedents” are consistent with “longstanding limits on judicial power,” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring); and (6) whether Plaintiffs can meet their burden of demonstrating that they are entitled to a permanent injunction, *see, e.g., eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (identifying factors that a plaintiff seeking permanent injunctive relief must satisfy).

If the Court nevertheless intends to move straight to summary judgment at this time, it should permit the parties the opportunity to submit supplemental briefing which will enable the parties to place all of the legal and factual issues in this case before the Court.² *See Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979) (when only a preliminary injunction is pending, “we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available.”). Based upon all of the foregoing, the Intervenor States—in agreement with the Plaintiffs—urge the Court to decline the Federal Defendants’ invitation to convert the pending preliminary injunction application into another motion. If the Court determines that summary judgment is appropriate at this time, however, the Intervenor States respectfully request that the Court grant the parties a 30-day period to file supplemental briefing on the additional issues identified above (and perhaps others).

² Whether the Court rules on the merits under the preliminary injunction standard or under the summary judgment framework, the Court’s ruling should be a final appealable order or a final judgment so that the parties may promptly seek appellate review.

Dated July 30, 2018

Respectfully submitted,

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